

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

NOV 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
)

Petition of Bell Atlantic for Forbearance)
from Section 272 Requirements in)
Connection with National Directory)
Assistance Services)

CC Docket No. 97-172
DA 99-2345

COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Roy E. Hoffinger
James H. Bolin, Jr.

Its Attorneys

Room 1130M1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4617

November 12, 1999

No. of Copies rec'd 0+7
List ABCDE

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. THE <i>NDA ORDER</i>	2
II. THE COMMISSION SHOULD CONSIDER WHETHER BELL ATLANTIC SHOULD BE SANCTIONED FOR ITS ONGOING VIOLATIONS OF THE COMMUNICATIONS ACT	4
III. BELL ATLANTIC'S PETITION DOES NOT SATISFY THE STATUTORY REQUIREMENTS FOR FORBEARANCE	8
A. The Petition Fails To Satisfy The Requirements Of §§ 10(a)(1) And (a)(2)	8
B. The Petition Fails To Satisfy The Requirements Of § 10(a)(3).	9
C. The Petition Does Not Permit A Finding That Bell Atlantic's NDA Is An Incidental InterLATA Service.	10
CONCLUSION	13

SUMMARY

Both the Commission's rulings regarding BOC NDA services and the instant Petition make clear that Bell Atlantic's national directory assistance ("NDA") service has been in violation of the Communications Act since that service's inception. By its own admission, Bell Atlantic's NDA violated § 271's prohibition on providing in-region interLATA services (and may still be in violation of that section), as well as, *inter alia*, § 272's separation, transaction disclosure, and nondiscrimination requirements. In addition to being liable for damages claims filed by its competitors, Bell Atlantic should face substantial Commission fines and forfeitures for these longstanding violations. Further, the Petition makes clear that despite the Commission's unequivocal ruling in the NDA Order, Bell Atlantic's NDA service currently operates in violation of § 272, and that RBOC evidently intends to continue to offer NDA in a manifestly illegal manner. Bell Atlantic's conduct is not only unlawful, it is open, willful, and knowing, and should be met with significant penalties.

The Petition is, moreover, inadequate to support forbearance under § 10. As the Commission has recognized, "a decision to forbear must be based upon a record that contains more than broad, unsupported allegations." The current record simply provides no basis on which the Commission could find that Bell Atlantic will provide (or currently provides) nondiscriminatory access to the directory assistance data that the NDA Order found is essential to permit other NDA providers to compete with BOC monopolists. Accordingly, the Commission cannot reasonably find that Bell Atlantic will comply with § 272(c)(1) if forbearance is granted, and the Petition thus cannot satisfy the

requirements of §§ 10(a)(1) and (a)(2) that forbearance must ensure the protection of both consumers and competition.

The Petition also fails the "public interest" criterion of § 10(a)(3). The paramount measure of the "public interest" under the Communications Act is the law as enacted by Congress. Bell Atlantic's strategy of willful, knowing and ongoing refusals to comply with the Act's requirements make it impossible for the Commission reasonably to find that forbearance is appropriate in this case.

Finally, the Petition does not permit the Commission to find that forbearance is even possible for much of Bell Atlantic's NDA service. The NDA Order ruled that forbearance could be granted to NDA offerings only to the extent that they are "incidental interLATA services." Bell Atlantic's bare statement that it has "purchased" one of the databases it uses for NDA is insufficient to establish whether that service meets the requirements of § 271(g)(4). Bell Atlantic must disclose the precise terms of its agreements with VoltDelta. In the absence of such a showing, the Commission cannot confirm whether forbearance from the portion of Bell Atlantic's NDA that uses the VoltDelta database is even possible, much less whether the Petition meets the § 10 criteria.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
)	
Petition of Bell Atlantic for Forbearance)	CC Docket No. 97-172
from Section 272 Requirements in)	DA 99-2345
Connection with National Directory)	
Assistance Services)	
)	

COMMENTS OF AT&T CORP.

Pursuant to Section 1.1 of the Commission's Rules, 47 C.F.R. § 1.1, and the Public Notice released October 28, 1999, AT&T Corp. ("AT&T") hereby submits its comments concerning Bell Atlantic's Petition For Forbearance ("Petition") from the separation requirements of § 272 for national directory assistance ("NDA") services offered by certain of its BOC subsidiaries.

It is obvious from the Petition that Bell Atlantic's NDA services have long been in violation of the Communications Act, and that petitioner intends to continue to flout federal law. Moreover, the Petition fails to provide an adequate basis for forbearance, and can and should be denied on that basis. At a minimum, the Commission should require Bell Atlantic to make a supplemental showing in support of its request for relief, with such further submission subject to public comment.

I. THE NDA ORDER

The Commission's recent NDA Order¹ addressed U S West's NDA service, which Bell Atlantic acknowledges is "generally the same" as its own.² That order ruled unequivocally that NDA is an in-region interLATA service, and that it is subject to the separation and nondiscrimination requirements of § 272.³ The NDA Order further held that, although NDA can in some cases be an "incidental interLATA service," the component of U S West's NDA service that provides out-of-region information does not fall into that category, because U S West does not own the database that it uses to store out-of-region directory assistance information.⁴ Accordingly, U S West could not lawfully provide that portion of the service prior to obtaining in-region interLATA authority pursuant to § 271.

As the Commission has recognized, it lacks authority to forbear from the requirements of § 271, including the § 272 obligations incorporated by § 271(d)(3)(B).⁵ The Commission has ruled, however, that it may forbear from the application of § 272 to the

¹ Memorandum Opinion and Order, Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, CC Docket Nos. 97-172, 92-105 (released September 27, 1999) ("NDA Order").

² Petition, p. 1.

³ NDA Order, ¶¶ 18, 28.

⁴ See id., ¶¶ 23-24; 47 U.S.C. § 271(g)(4).

⁵ See NDA Order, ¶ 28; Memorandum Opinion and Order, Petitions For Forbearance From The Application Of Section 272 Of The Communications Act Of 1934, As Amended, To Certain Activities, CC Docket No. 96-149, DA 98-220, ¶ 22 (released February 6, 1998) ("E911 Forbearance Order") ("[P]rior to their full implementation we lack authority to forbear from application of the requirements of section 272 to any service for which the BOC must obtain prior authorization under section 271(d)(3).").

incidental interLATA services described in § 271(g).⁶ Accordingly, the NDA Order granted U S West forbearance from some of § 272's requirements⁷ for the portion of its NDA service that is an incidental interLATA service under § 271(g)(4).

The Commission held that it could not forbear from § 272(c)'s broad nondiscrimination provisions because of "[t]he competitive advantages U S WEST enjoys with respect to the provision of directory assistance service throughout its region" due to "its dominant position in the local exchange and exchange access markets."⁸ The NDA Order found that U S West had not provided unaffiliated entities with "access to the in-region telephone numbers it uses to provide [NDA] at the same rates, terms, and conditions it imputes to itself," and that the rates U S West did charge "have the potential to adversely affect competition" in the market for NDA services.⁹ Further, the Commission affirmed that directory information available from other sources is less complete, accurate, and reliable than that U S West obtains in its role as incumbent local exchange monopolist in its territory.¹⁰

⁶ See E911 Forbearance Order, ¶ 65 ("[W]e have authority to forbear from the application of section 272 to BOC provision of ... the incidental activities described in section 271(g) of that Act.").

⁷ The Commission did not forbear from the nondiscrimination requirements of § 272(c). E.g., NDA Order, ¶ 3.

⁸ NDA Order, ¶ 35.

⁹ Id., ¶¶ 34, 35.

¹⁰ Id., ¶ 35. Some BOCs have attempted to argue that the Commission's decision to remove directory assistance from the list of available unbundled network elements demonstrates that ILECs (and BOCs in particular) do not have unique access to directory data. To the contrary, the Commission has repeatedly found that other sources of such data are inherently inferior. See, e.g., Third Report and Order, Implementation of the

(footnote continued on next page)

In light of U S West's unique access to directory assistance data in its region, the NDA Order stressed that the statutory requirements for forbearance would be met only if the Commission retained § 272(c)'s nondiscrimination requirements.¹¹ The Commission therefore required U S West to make available to unaffiliated entities all of the in-region directory listing information it uses to provide NDA on the same rates, terms, and conditions it imputes to itself, and to update and maintain the directory listing information it provides to unaffiliated entities in the same manner it updates and maintains those listings for its own NDA service.¹²

II. THE COMMISSION SHOULD CONSIDER WHETHER BELL ATLANTIC SHOULD BE SANCTIONED FOR ITS ONGOING VIOLATIONS OF THE COMMUNICATIONS ACT

Both the Commission's rulings regarding BOC NDA services and the Petition itself make clear that Bell Atlantic's NDA has been in violation of the Communications Act since that service's inception.¹³ By its own admission, Bell Atlantic's NDA violated § 271's prohibition

(footnote continued from previous page)

Telecommunications Act of 1996, CC Docket No. 96-115, FCC 99-227, ¶¶ 87, 88 (released September 9, 1999); E911 Forbearance Order, ¶ 76. Indeed, the UNE Remand Order repeatedly makes clear that, although directory assistance services are no longer in all cases a UNE, the Commission relies on the availability of directory assistance data on nondiscriminatory terms under 47 U.S.C. § 251(b)(3) to ensure that meaningful directory assistance competition is possible. See, e.g., Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238, ¶¶ 457, 464 (released November 5, 1999).

¹¹ See, e.g., NDA Order, ¶¶ 36, 47.

¹² Id., ¶ 37.

¹³ Bell Atlantic has provided NDA since at least February 1999. See Bell Atlantic Launches 'National 411' in New York, February 2, 1999 (Bell Atlantic press release) <http://www.ba.com/nr/1999/Feb/19990202003.html>.

on providing in-region interLATA services (and may still be in violation of that section, as shown below); as well as multiple provisions of § 272, including that section's separation, transaction disclosure, and nondiscrimination requirements. In addition to being liable for damages claims filed by its competitors,¹⁴ Bell Atlantic should face substantial Commission fines and forfeitures for these longstanding violations. Further, the Petition makes clear that despite the Commission's unequivocal ruling in the NDA Order, Bell Atlantic's NDA service currently operates in violation of § 272, and that RBOC evidently intends to continue to offer NDA in a manifestly illegal manner. Bell Atlantic's conduct is not only unlawful, it is open, willful, and knowing, and should be met with significant penalties.

The Commission adopted the NDA Order and issued a press release describing its ruling on June 9, 1999, almost three and one-half months before Bell Atlantic filed the instant Petition. That release made clear that NDA is an interLATA service, and that even the component of U S West's NDA for which the Commission granted forbearance remained subject to § 272(c)'s nondiscrimination requirements.¹⁵ The NDA Order was released on September 27, 1999. The order expressly "emphasize[d] that our decision to forbear in the instant proceeding is limited exclusively to U S West's provision of regionwide directory assistance service."¹⁶ Bell

¹⁴ See MCI Telecommunications Corp. v. U S West Communications, Inc., File Nos. E-97-40 & E-97-19, DA 99-2479, ¶¶ 17, 19 (released November 8, 1999) (holding U S West and Ameritech liable for damages from the inception of their NDA services for operating in violation of §§ 272 & 271).

¹⁵ FCC Grants U S West Significant Regulatory Relief To Provide Nonlocal Directory Assistance Service, Report No. 99-19, CC Docket Nos. 97-172, 92-105, released June 9, 1999.

¹⁶ NDA Order, ¶ 54.

Atlantic thus had unequivocal notice that its NDA service was subject to § 272. Nevertheless, when Bell Atlantic filed its New York § 271 petition -- after the NDA Order's release -- it failed to make any mention of the fact that its NDA service was openly noncompliant with § 272 (and may have been in violation of § 271 as well). Indeed, the instant Petition -- filed only after AT&T's opposition to the New York § 271 application revealed that Bell Atlantic's NDA was flouting § 272 -- amounts to an admission that Bell Atlantic's NDA service is currently (and long has been) unlawful.

In addition to its obvious failure to comply with, *inter alia*, the separation and transaction disclosure requirements of § 272, the Petition suggests that Bell Atlantic does not intend to comply with the nondiscrimination requirements of § 272(c). Bell Atlantic blandly states, carefully using the future tense, that it "will offer" access to listing information and otherwise "will comply" with the nondiscrimination requirements imposed in the NDA Order.¹⁷ The Petition's generalized promise to offer, at some undefined future time, nondiscriminatory access to Bell Atlantic's directory assistance data simply ignores the fact that § 272(c) requires this conduct from Bell Atlantic today.¹⁸ Moreover, it is clear that a future forbearance grant can in no way affect Bell Atlantic's current obligations. The Commission cannot grant forbearance

¹⁷ Petition, p. 4.

¹⁸ Bell Atlantic should not be heard to argue that it has not violated § 272(c) because that section requires only nondiscrimination between a BOC and its separate affiliate, and that it has not placed its NDA operations in such an affiliate. The failure to utilize an affiliate for NDA is, of course, a direct violation of a separate requirement under the Act. Such an argument would be analogous to the defense proffered by the proverbial defendant who, charged with killing both his parents, sought leniency on the grounds that he was an orphan.

for past conduct, because to do so would constitute impermissible retroactive rulemaking.¹⁹

Thus, the Common Carrier Bureau recently ruled that U S West was liable for damages for its violations of §§ 271 and 272 "from the inception of its nonlocal directory assistance service until the date upon which the Commission's forbearance in the *NDA Order* became effective."²⁰

Moreover, Bell Atlantic fails even to make a promise that it will comply with the law in the future for many of its BOC subsidiaries. A footnote to the Petition reveals that it is filed only on behalf of New York Telephone and New England Telephone, and that the other Bell Atlantic BOCs intend to file "a separate petition" at some unknown point in the future.²¹ Bell Atlantic thus apparently intends to continue to provide NDA unlawfully in the southern half of its territory. The Commission should not countenance what appears to be an effort to "clean-up the record" for Bell Atlantic's New York § 271 application via a perfunctory six-page forbearance petition that fails even to address continuing violations of the Act in half the states Bell Atlantic serves. Bell Atlantic has elsewhere asserted that "the best indicator of future performance is actual experience to date."²² The sorry record of Communications Act violations

¹⁹ See, e.g., Bowen v. Georgetown Hosp., 488 U.S. 204 (1988).

²⁰ MCI v. U S West, ¶ 19. Bell Atlantic also must not be heard to argue that its past conduct is excused by the fact that the law regarding its NDA service was somehow unsettled prior to the release of the NDA Order. As the decision in MCI v. U S West (as well as black-letter law) makes clear, that claim is no defense. In all events, Bell Atlantic's ongoing failure to comply with § 272(c) cannot be excused by a purported lack of understanding of its legal obligations following release of NDA Order.

²¹ Petition, p. 1, n.2.

²² Reply Comments of Bell Atlantic, Application by New York Telephone Company (d/b/a Bell Atlantic- New York), Bell Atlantic Communications, Inc., NYNEX Long Distance

(footnote continued on next page)

accumulated by Bell Atlantic's NDA service makes plain that Bell Atlantic flunks its own test as to §§ 271 and 272.

Having now offered NDA for nearly a year in violation of the Act and in a manner that takes improper advantage of its monopoly power, Bell Atlantic must not be permitted simply to continue that violation while the Commission considers the Petition. The Commission should, at minimum, order Bell Atlantic to show cause why its past and continuing violations should not be the subject of immediate enforcement proceedings.

III. BELL ATLANTIC'S PETITION DOES NOT SATISFY THE STATUTORY REQUIREMENTS FOR FORBEARANCE

A. The Petition Fails To Satisfy The Requirements Of §§ 10(a)(1) And (a)(2).

Sections 10(a)(1) and (a)(2) require that in order to forbear, the Commission must find that enforcement of a statutory provision "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" and "is not necessary for the protection of consumers."²³ As shown above, the NDA Order concluded that these criteria were satisfied in the case of forbearance from

(footnote continued from previous page)

Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region InterLATA Services in New York, CC Docket No. 99-295, p. 16 (filed November 8, 1999).

²³ 47 U.S.C. §§ 160(a)(1), (a)(2).

§ 272 for NDA services only with "retention of the nondiscrimination requirements found in section 272(c)(1)."²⁴

Bell Atlantic has not shown that it currently complies with the nondiscrimination requirements of § 272(c); indeed, it has not even committed to comply with those requirements prior to the time it may obtain forbearance. The Petition states in two sentences that Bell Atlantic "will comply" with the NDA Order, without providing any explanation of how it intends to do so, when it intends to do so, or how it will enable either the Commission or unaffiliated entities to verify that it is doing so.²⁵

The E911 Forbearance Order held that "a decision to forbear must be based upon a record that contains more than broad, unsupported allegations of why those criteria are met."²⁶ The current record simply provides no basis on which the Commission could find that Bell Atlantic will provide (or currently provides) nondiscriminatory access to the directory assistance data that the NDA Order found is essential to NDA competition.²⁷ The Commission simply has no information as to how (or whether) Bell Atlantic will permit competitors to obtain directory

²⁴ NDA Order, ¶ 36; see also id., ¶ 47.

²⁵ In the absence of transaction disclosure requirements such as those in § 272(b)(5), neither the Commission nor third parties will have any means to verify Bell Atlantic's compliance with § 272(c)(1).

²⁶ E911 Forbearance Order, ¶ 16.

²⁷ Although the Petition states in passing that "[n]ationwide telephone listings are also available from CD-ROM providers, Internet service providers" and other sources, the NDA Order expressly found that U S West failed to show "that any of these alternative sources of nonlocal directory assistance service offer directory listing information that is as up-to-date as the information provided by U S WEST." NDA Order, ¶ 35.

assistance data on nondiscriminatory terms. Accordingly, the Commission has no basis upon which to find that Bell Atlantic will comply with § 272(c)(1) if forbearance is granted.

B. The Petition Fails To Satisfy The Requirements Of § 10(a)(3).

Section 10(a)(3) requires the Commission to find that "forbearance from applying [a] provision or regulation is consistent with the public interest."²⁸ The instant Petition cannot satisfy this statutory criterion in light of Bell Atlantic's longstanding (and ongoing) refusal to comply with the Act's requirements. The paramount measure of "the public interest" under the Act is the law as enacted by Congress. The Commission should not -- and lawfully cannot -- condone Bell Atlantic's strategy of willful, knowing and ongoing refusals to comply with the requirements the Act imposes on its NDA service.

C. The Petition Does Not Permit A Finding That Bell Atlantic's NDA Is An Incidental InterLATA Service.

As described above, the Commission has repeatedly recognized that it cannot forbear from applying § 272 to any interLATA service that a BOC is prohibited from providing prior to obtaining in-region interLATA relief. The NDA Order makes clear that a BOC may not provide NDA before it obtains § 271 authority unless that service is configured in such as way that it is an incidental interLATA service pursuant to § 271(g)(4).

The NDA Order observed that the out-of-region component of U S West's NDA was not an incidental interLATA service because it utilized a database owned by Nortel. However, the Commission "emphasized that our determination that U S West's nationwide directory assistance service does not satisfy the requirements of section 271(g)(4) is limited to

²⁸ 47 U.S.C. § 160(a)(3),

the facts presented in the instant proceeding."²⁹ The Commission did not speculate on the circumstances that might lead it to conclude that U S West's NDA satisfied § 271(g)(4), and expressly reserved judgment as to how it might rule if U S West owned the database of out-of-region numbers used by its NDA service.³⁰

Bell Atlantic's Petition addresses this aspect of the NDA Order in a single sentence, observing blandly that the "information storage facilities" used by its NDA service "were owned by VoltDelta, but have been purchased by Bell Atlantic."³¹ This statement reveals that Bell Atlantic's NDA service definitely violated § 271 at some point in the recent past. It is, however, insufficient to demonstrate that that service is currently an incidental interLATA service.

Bell Atlantic's bare statement that it has "purchased" the database it uses for its NDA offering does not permit the Commission to determine whether that service meets the requirements of § 271(g)(4). Bell Atlantic must disclose the precise terms of its agreements with VoltDelta in order to permit both the Commission and commenters to evaluate whether those arrangements are sufficient to render Bell Atlantic's NDA an "incidental interLATA service."

²⁹ NDA Order, ¶ 24 (emphasis added).

³⁰ See id., ¶ 24 n.67 ("If U S West, rather than Nortel, owned the information storage facility containing the out-of-region directory listings, our conclusion may be different.") (emphasis added). The Commission noted (¶ 28) that "if U S WEST was providing the nationwide component of its nonlocal directory assistance service in compliance with section 271(g)(4), the forbearance analysis set forth herein would apply to its provision of that service as well." That statement, however, does not indicate what steps U S West would have to take in order to offer NDA "in compliance with section 271(g)(4)."

³¹ Petition, p. 2.

For example, Bell Atlantic must show when (or whether) this "purchase" was fully consummated³² and whether it confers discriminatory advantages on VoltDelta, such as by permitting it preferential access to Bell Atlantic's own directory assistance data in exchange for a lower price.³³ Bell Atlantic also must reveal the terms of this transaction so that the Commission can determine whether it has "purchased" a sufficient interest to satisfy § 271(g)(4). As the NDA Order implicitly recognized by limiting its ruling to the facts before it, a BOC could enter into arrangements concerning NDA databases that would not permit its NDA offering to be deemed an incidental interLATA service. Indeed, BellSouth recently sought reconsideration of the NDA Order on the grounds that § 271(g)(4) purportedly permits a BOC to obtain a variety of lesser interests than outright ownership of a database.

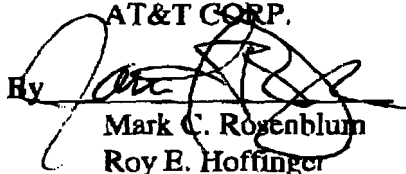
³² This information would also be highly relevant to Bell Atlantic's pending application for in-region interLATA authority in New York, as it would reveal whether that BOC was in violation of § 271 at the time it submitted its application.

³³ If Bell Atlantic has granted preferential access to VoltDelta, the NDA Order would not permit forbearance unless Bell Atlantic first undid the effects of that discrimination. Any other result would permit Bell Atlantic to gain the very advantages from its monopoly position that the NDA Order found would preclude forbearance (and which Congress prohibited in § 272(c)).

CONCLUSION

For the reasons stated above, the Petition should be denied. In the alternative, the Commission should require Bell Atlantic to make a further showing, consistent with AT&T's comments, in support of its request for forbearance.

Respectfully submitted,

AT&T CORP.
By 
Mark C. Rosenblum
Roy E. Hoffinger
James H. Bolin, Jr.

Its Attorneys

Room 1130M1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4617

November 12, 1999

CERTIFICATE OF SERVICE

I, Margaret Brue, do hereby certify that on this 12th day of November, 1999, a copy of the foregoing "Comments of AT&T Corp." was filed by U.S. first-class mail, postage prepaid to the party listed below:

John M. Goodman
Michael E. Glover
Bell Atlantic
1300 I Street, N.W.
Washington, DC 20005

Margaret Brue
Margaret Brue

November 12, 1999